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Jury Selection: The Need for Statutory Reform in Minnesota

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Notes

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I. INTRODUCTION

In most instances, an individual confronted with the administration of justice through the judicial process is guaranteed the opportunity to have his cause considered by an impartial jury drawn from a fair cross-section of the community.[1] The constitutional guarantee extends to both the grand jury which indicts and the petit jury which sits as the trier of fact.[2] Congress and the state legislatures have the responsibility of implementing this fundamental guarantee. In Minnesota, however, the statutory provisions which govern jury selection, while perhaps satisfying the bare constitutional mandate, are deficient in many crucial respects.

Starting with the basic premise that jury selection statutes should reduce to an absolute minimum the opportunities for discrimination and prejudice in the selection process, this Note will attempt to expose the flaws in Minnesota's statutory scheme. It will focus exclusively on the inadequacies of the statutory provisions which control the *initial selection processes*,[3] and

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1. U.S. CONST. amends. VI, VII, XIV. *See also* MINN. CONST. art. I, §§ 4, 6, 7.

2. *See* Pierre v. Louisiana, 306 U.S. 352, 362 (1939), where the Court noted: "Principles which forbid discrimination in the selection of Petit Juries also govern the selection of Grand Juries."

A grand jury has been defined as:

> [A] body of men or women, or both, returned at stated periods from the citizens of the county before a court of competent jurisdiction, chosen by lot, and sworn to inquire as to public offenses committed or triable in the county. . . .

MINN. STAT. § 628.41 (1967). *See also* BLACK'S LAW DICTIONARY 993 (4th ed. 1968). The function of the grand jury is twofold. It protects the general interests of society by inquiring into the commission of crimes, and it stands as a buffer between the state acting through the prosecutor and the individual. State v. Iosue, 220 Minn. 283, 19 N.W.2d 735 (1945).

A petit jury, on the other hand, is:

> . . . a body of twelve men or women, or both, impaneled and sworn in the district court to try and determine, by a true and unanimous verdict, any question or issue of fact in a civil or criminal action or proceeding, according to the law and the evidence as given them in court.

MINN. STAT. § 593.01 (1967). *See also* BLACK'S LAW DICTIONARY 994 (4th ed. 1968).

3. For the purposes of this Note *initial selection processes* are defined as those actions by which names of prospective grand and petit

emphasis will be placed on the constitutional implications of those deficiencies. In addition, the Federal Jury Selection and Service Act of 1968 will be examined and compared with present Minnesota statutes. It will be argued that the Federal Act has solved many of the jury selection problems of the federal judiciary, and that the approach embodied in that Act should be adopted in Minnesota to eliminate the inadequacies of the current statutory provisions.

II. A CONSTITUTIONAL OVERVIEW OF JURY SELECTION

The sixth amendment to the United States Constitution provides in part: ". . . [T]he accused shall enjoy the right to a speedy and public trial, by an *impartial jury* of the State and the district wherein the crime shall have been committed. . . ."[4] The right to trial before an impartial jury guaranteed by this amendment is directly applicable against the federal government and has been held to apply against the states through the due process and equal protection clauses of the fourteenth amendment.[5]

The central function of the due process clause of the fourteenth amendment is to guarantee every individual a fair trial.[6] While the trial need not be before a jury,[7] if a jury is used it

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jurors are obtained and placed on the master lists from which particular panels are ultimately drawn. This Note will not consider the means by which jurors are drawn for a particular panel nor subsequent *voir dire* procedures.

4. U.S. CONST. amend. VI (emphasis added). The Minnesota Constitution contains a substantially identical provision. MINN. CONST. art. I, § 6.

5. *See* Duncan v. Louisiana, 391 U.S. 145 (1968). *See also* 53 MINN. L. REV. 414 (1968). *But see* Fay v. New York, 332 U.S. 261, 288 (1947); Palko v. Connecticut, 302 U.S. 319, 329 (1937); Wagner Elec. Co. v. Lyndon, 262 U.S. 226, 232 (1923); New York Cent. R.R. v. White, 243 U.S. 188, 208 (1916); Walker v. Sauvinet, 92 U.S. 90, 92 (1875).

6. *See* Palko v. Connecticut, 302 U.S. 319, 327 (1937), where the Court stated:

> Fundamental too in the concept of due process and so in that of liberty, is the thought that condemnation shall be rendered only after trial. . . . The hearing, moreover, must be a real one, not a sham or a pretense.

See also Scott, *The Supreme Court's Control over State and Federal Criminal Juries*, 34 IOWA L. REV. 577, 579 (1949).

7. The Supreme Court has often noted in dicta that the states could abolish trial by jury. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 324 (1937); cases cited following *Palko v. Connecticut* in note 5 *supra*. *See also* Scott, *supra* note 6, at 580; Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 YALE L.J. 919, 920 n.9 (1965). In Duncan v. Louisiana, 319 U.S. 145 (1968), however, the Court held that the sixth amendment requires the states to afford a jury trial to all criminal defendants except when offenses which may be cate-

must be fairly and impartially drawn.[8] To be violative of due process, jury selection procedures must be found to lack that measure of fundamental fairness deemed implicit in the concept of ordered liberty.[9]

In order to establish a violation of due process, absent a correlative violation of equal protection,[10] an individual must prove that the discrimination in the selection of jurors hearing his case was arbitrary and intentional.[11] If the individual is a

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gorized as "petty" are involved or when the defendant has waived a jury trial. It has been asserted that the decision in *Duncan* does not significantly affect the present right to jury trial in Minnesota. *See* 53 MINN. L. REV. 414, 417-18 (1968). The basis for the assertion is that Minnesota currently provides for a jury trial in all criminal prosecutions under state statutes except those involving municipal police regulations or ordinances. *Id.* at 418. *See also* State v. Ketterer, 248 Minn. 173, 177, 79 N.W.2d 136, 139 (1956). *But see* State v. Hoben, 256 Minn. 346, 98 N.W.2d 813 (1959); MINN. STAT. § 484.63 (1967) (jury trial available on appeal to district court).

8. Comment, 1967 DUKE L.J. 346. *See also* Kadish, *Methodology and Criteria in Due Process Adjudication*, 66 YALE L.J. 319, 346 (1957).

9. This criterion was enunciated in Palko v. Connecticut, 302 U.S. 319 (1937), as a test for determining whether provisions of the first eight amendments should be incorporated into the fourteenth amendment, thereby making them applicable against the states. *See also* Pointer v. Texas, 380 U.S. 400, 403 (1965); Malloy v. Hogan, 378 U.S. 1, 6 (1964); Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963); *In re* Oliver, 333 U.S. 257, 273 (1948); Powell v. Alabama, 287 U.S. 45, 67 (1932). Its most recent Supreme Court articulation appears in Duncan v. Louisiana, 391 U.S. 145 (1968), where the Court stated:

> Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.

Id. at 150 n.14.

The process of incorporation of sixth amendment provisions into the fourteenth amendment pursuant to the enunciated criterion has been a gradual process. It was once thought that none of the provisions of the sixth amendment applied against the states. *See* West v. Louisiana, 194 U.S. 258, 264 (1904). The Supreme Court, however, in Washington v. Texas, 388 U.S. 14, 18 (1967), noted an increasing willingness in recent years to look to the specific guarantees of the sixth amendment to see if due process had been afforded a defendant. *See, e.g.*, Washington v. Texas, *supra* (compulsory process for obtaining witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, *supra* (confrontation of witnesses); Gideon v. Wainwright, *supra* (assistance of counsel); *In re* Oliver, *supra* (public trial). This trend recently culminated in Duncan v. Louisiana, *supra* (right to jury trial).

10. For a general discussion of the requirements of due process of law and the incorporation of the equal protection clause into those requirements, see Note, *supra* note 7, at 936-40.

11. *See* Fay v. New York, 332 U.S. 261, 284, 294 (1947).

member of the excluded class, the prejudicial effect of the discrimination will be presumed under the "same class" rule.[12] If, on the other hand, he is not a member of the excluded class, he must also prove that the discrimination against that class prejudicially affected his case.[13]

The equal protection clause, in the jury selection context as in other areas, simply guarantees every individual equal standing before the law.[14] It requires that selection classifications be reasonably related to a valid legislative purpose.[15] That purpose is usually expressed in terms of obtaining competent jurors. If the statutory classifications are so related, the fact that they may exclude large portions of the general public from consideration for jury service is constitutionally immaterial.[16] Classifi-

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12. The "same class rule" has been formulated as follows:

> If the defendant is a member of the race or other class excluded the danger of prejudice is great enough so that we will condemn the exclusion without looking for actual prejudice; but if he is not a member of the excluded race or class the danger is not so great, and before we will condemn the exclusion as unconstitutional we must find that the defendant was actually prejudiced.

Note, *supra* note 7, at 920. *See also* Scott, *supra* note 6, at 584, 592-94. Scott, *id.* at 920 n.10, cites the following as examples of the "same class rule": A white man cannot complain because Negroes have been excluded—Griffin v. State, 183 Ga. 775, 190 S.E.2d 2 (1937); Commonwealth v. Wright, 79 Ky. 22 (1880); State v. Dierlamn, 189 La. 544, 180 So. 135 (1938); State v. Koritz, 227 N.C. 552, 43 S.E.2d 77, *cert. denied,* 332 U.S. 768 (1947); Barry v. State, 305 S.W.2d 580 (Tex. Crim.), *cert. denied,* 355 U.S. 851 (1957). *But see* Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711 (1964). A Negro cannot complain because whites have been excluded: Haraway v. State, 203 Ark. 912, 159 S.W.2d 733 (1942). A man cannot complain because women have been excluded from his jury: State v. Jones, 44 Del. 372, 57 A.2d 109 (1947); State v. Taylor, 356 Mo. 1216, 205 S.W.2d 734 (1947). *See also* State v. Dilliard, 279 Minn. 414, 421, 157 N.W.2d 75, 80 (1968), where the court said in dictum that a Negro physician could not complain about possible arbitrary exclusion of low socio-economic classes from grand juries.

13. *See* Fay v. New York, 332 U.S. 261 (1947); Rawlins v. Georgia, 201 U.S. 638 (1906).

14. *See* Fay v. New York, 332 U.S. 261, 285 (1947), where the Court noted:

> [A state cannot] . . . shunt a defendant before a jury so chosen as greatly to lessen his chances while others accused of a like offense are tried by a jury so drawn as to be more favorable to them. . . .

See also Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943); Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations,* 71 YALE L.J. 1387, 1406-07 (1962); Note, *supra* note 7.

15. *See generally* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 343-65 (1949).

16. *See, e.g.,* Fay v. New York, 332 U.S. 261 (1947), where the Supreme Court held that the selection procedures employed to obtain

cations predicated upon race or color have been regarded as immediately suspect.[17]

A prima facie case of violation of the equal protection clause may be established by means of the "rule of exclusion."[18] This requires the complaining individual to demonstrate the existence of a distinct class of citizens within his community,[19] and to establish the absence[20] or gross underrepresentation of that class on past lists of prospective jurors.[21] At that point the burden shifts to the state and a prima facie case is made if the officials responsible for selecting prospective jurors are unable to explain the class's absence or gross underrepresentation on jury lists.[22]

A violation of equal protection may also be established by a

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jurors for the New York Special Jury did not violate equal protection. Under those procedures the clerk of courts, acting pursuant to legislative standards, administratively narrowed a panel of 60,000 names to one of 3,000.

17. *See, e.g.*, Cassell v. Texas, 339 U.S. 282 (1950); Strauder v. West Virginia, 100 U.S. 303 (1879). *See also* Brown v. Board of Educ., 347 U.S. 483 (1954); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

18. *See, e.g.*, Hill v. Texas, 316 U.S. 400, 402 (1942); Pierre v. Louisiana, 306 U.S. 354, 361-62 (1939); Neal v. Delaware, 103 U.S. 370, 397 (1880).

19. Hernandez v. Texas, 347 U.S. 475, 479 (1954).

20. Eubanks v. Louisiana, 356 U.S. 584 (1958) (one Negro called for jury service within memory); Hernandez v. Texas, 347 U.S. 475 (1954) (no Mexican-American jurors within 25 years); Patton v. Mississippi, 332 U.S. 463 (1947) (one Negro called in 30 years); Hill v. Texas, 316 U.S. 400 (1942) (no Negroes called for grand jury in 16 years).

21. *See* Whitus v. Georgia, 385 U.S. 545 (1967) (42% of eligible population and 27% of taxpayers on lists from which names were taken were Negro, while only 9% of prospective jurors were Negro). *But see* Swain v. Alabama, 380 U.S. 202 (1965) (26% of eligible population were Negroes, as were 10 - 15% of the venires); Brown v. Allen, 344 U.S. 443 (1953) (16% of eligible population were Negroes, as were 7 - 17% of the venires). *See also* Labat v. Bennett, 365 F.2d 98 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967) (25.8% of eligible population were Negro, as were 4.9 - 16.1% of the venires); United States *ex rel.* Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), *cert. denied*, 372 U.S. 924 (1963) (31% of eligible population compared to 2% of venires); Mitchell v. Johnson, 250 F. Supp. 117 (M.D. Ala. 1966) (82% of eligible population compared to 35.7% of venires); Bass v. State, 254 Miss. 723, 182 So. 2d 591 (1966) (42% of eligible population compared to 2½% of venires).

22. *See* Patton v. Mississippi, 332 U.S. 463, 466 (1947). *See also* Hernandez v. Texas, 347 U.S. 475, 481-82 (1954), where the Court pointed out that the "rule of exclusion" prima facie case cannot be countered by generalities. Quoting from Norris v. Alabama, 294 U.S. 587, 598 (1935), the Court emphasized:

> If . . . the mere general assertions by [selection] officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision . . . would be but a vain and illusory requirement.

showing of discrimination in the selection of a particular jury list or panel, notwithstanding the absence of discrimination in the selection of past lists or panels. For example, testimony by officials responsible for selection that they knew no members of an excluded class and that only personal acquaintances were considered as prospective jurors may be sufficient to demonstrate discrimination in the selection of a particular panel in violation of the equal protection clause.[23]

Over the years a number of jury selection provisions and procedures have been reviewed by the courts under the due process and equal protection clauses. As a result, some generalizations have emerged. Selection provisions or procedures which provide for systematic or intentional exclusion from jury service because of race, religion, social status, occupation, earning capacity or political affiliation have traditionally been regarded as violative of the fourteenth amendment.[24] The same view has been taken of procedures which result in "token representation."[25] Representation is deemed "token" when members of a normally excluded class or group are intentionally included on lists of prospective jurors in order to create a semblance of nondiscrimination.[26] While token representation has been roundly condemned,[27] the courts have recently recognized that conscious awareness of race in extinguishing discrimination in the selection of prospective jurors is permissible.[28] The critical factor which distinguishes inclusion based on conscious awareness of race from token representation is simply the intent upon which the inclusion is premised. Allocation of the burden of establishing this intent parallels the equal protection "rule of exclusion." Where the rule applies, the state must establish a proper intent.[29]

23. Cassell v. Texas, 339 U.S. 282, 239 (1950). *See also* Comment, 4 HOUSTON L. REV. 570, 575 (1966).

24. *See, e.g.*, Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (dicta as to social status, occupation, earning capacity); Strauder v. West Virginia, 100 U.S. 303 (1879) (race); Kentucky v. Powers, 139 F. 452 (C.C.E.D. Ky. 1905) (political party affiliation); Juarez v. State, 102 Tex. Crim. 297, 277 S.W. 1091 (1925) (Catholics).

25. Brown v. Allen, 344 U.S. 443, 471 (1953). *See also* Smith v. Texas, 311 U.S. 128 (1940).

26. *See* cases cited note 25 *supra.*

27. *Id.*

28. Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967). *Contra*, Collins v. Walker, 335 F.2d 417 (5th Cir.), *cert. denied*, 379 U.S. 901 (1964). *See also* Martin, *The Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury*, 4 HOUSTON L. REV. 448 (1966); Comment, 42 N.Y.U.L. REV. 364 (1967); Comment, 13 WAYNE L. REV. 403 (1967).

29. *See* notes 18-22 *supra*, and accompanying text.

In all other cases a discriminatory intent must be demonstrated by the complaining individual.[30]

Finally, it should be noted that judicial approval of inclusion based on a conscious awareness of race does not require compliance with demands for precise proportional representation of various segments of the community on lists of prospective jurors or on particular panels.[31] Such demands have never been regarded as within the ambit of the fourteenth amendment.[32]

Even this rudimentary discussion of the due process and equal protection clauses demonstrates that the available opportunities for discrimination and prejudice in the jury selection process need not be reduced to an absolute minimum in order for the selection process to comport with the constitutional safeguards.[33] The more subtle and pervasive discriminatory practices are apparently beyond the scope of present interpretations of equal protection and due process of law. It is submitted that those practices can be eliminated only through the use of legislative selection standards which are more precise than those currently being applied pursuant to equal protection and due process. The following examination of the Minnesota jury selection provisions and procedures will demonstrate how vague statutory provisions afford opportunities for subtle discrimination and prejudice in the jury selection process despite existing constitutional safeguards.

III. THE MINNESOTA JURY SELECTION SYSTEM

A. Introduction

The statutory provisions which control the initial jury selection processes in Minnesota are contained in Minnesota Statutes, chapter 593.[34] Section 593.13 sets out selection procedures for

30. *See* text accompanying notes 11-13 and 23 *supra*.

31. Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967).

32. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 208 (1965); Hernandez v. Texas, 347 U.S. 475, 482 (1954); Anderson v. Johnson, 371 F.2d 84 (6th Cir. 1966); United States v. American Oil Co., 249 F. Supp. 130 (D.N.J. 1965).

33. *See* United States v. Curry, 358 F.2d 904 (2d Cir. 1965), *cert. denied*, 385 U.S. 873 (1967). *See also* notes 11-13 & 19-23 *supra*, and accompanying text, where it is indicated that the burden of establishing defects in a selection system rests firmly on the individual.

34. Minn. Stat. §§ 593.13-.14 (1967).

The entire Minnesota jury system is established in two interrelated blocks of statutes. The operation of the petit jury system is set out in Minn. Stat. §§ 593.01-.21 (1967), and the operation of the grand jury

system in MINN. STAT. §§ 628.41-.58 (1967). The statutes are interrelated in that the selection procedures described in §§ 593.13-.14, the exemptions from jury service detailed in § 628.43, and the grounds for excuse from service in § 628.49 are applicable to both grand and petit jurors.

This Note's discussion of the selection of prospective grand jurors for both large and small counties in Minnesota must be considered in light of the following caveat. In Minnesota, as in most states, a dual system is available for filing charges against a criminal defendant. MINN. STAT. §§ 628.01-.33 (1967). *See also* State v. Linehan, 276 Minn. 349, 150 N.W.2d 203 (1967). One method is for the grand jury to return an indictment or presentment against a particular defendant. An indictment is usually framed by the prosecuting attorney and presented by him for acceptance or rejection by the grand jury. A presentment is an accusation made by the grand jury on its own motion, based upon either its own observation or knowledge, or upon evidence presented to it. MINN. STAT. § 628.01 (1967); BLACK'S LAW DICTIONARY 912 (4th ed. 1968). At least two significant aspects of the use of a grand jury must be recognized. First, a grand jury proceeding is secret, MINN. STAT. §§ 628.64-.68 (1967), and usually is limited to a presentation of prosecution's side of the case, MINN. STAT. § 628.59 (1967). An indictment is returned if *that* evidence would warrant conviction. MINN. STAT. § 628.03 (1967). Second, the decision to employ a grand jury to obtain an indictment is largely within the discretion of the prosecuting attorney. A grand jury is required only in cases where the possible punishment is life imprisonment. *See* OP. MINN. ATT. GEN., 260-B. Oct. 29, 1952. In all other cases a prosecuting attorney may resort to the second method of filing criminal charges against a particular defendant. He, or in some cases the trial court, MINN. STAT. § 628.32 (1967), may file an information accusing the defendant of a crime. Although the indictment and information serve the same purpose, State v. Owens, 268 Minn. 321, 129 N.W.2d 284 (1964), there are several obvious distinctions. The most significant is that before an information can be filed the suspect must normally be afforded a preliminary hearing before a justice of the peace or examining magistrate. MINN. STAT. § 628.31 (1967). The hearing can be waived, however, by the defendant. State *ex rel.* Webber v. Tahash, 277 Minn. 302, 152 N.W.2d 497 (1967). In addition, its denial may be considered non-prejudicial. *See, e.g.*, State v. Linehan, *supra*; State *ex rel.* Miletich v. Tahash, 275 Minn. 505, 148 N.W.2d 134 (1967). The ostensible purpose of the hearing is to determine whether there is probable cause to hold the suspect. The presiding magistrate has the authority to hear evidence, rule on admissibility, and discharge the suspect in the absence of a sufficient showing by the state. State v. Zirbes, 274 Minn. 288, 143 N.W.2d 212 (1966). Although the state is not required to reveal all its evidence, State *ex rel.* Hastings v. Bailey, 263 Minn. 261, 116 N.W.2d 548 (1962), the hearing often affords the accused and his counsel an important opportunity to discover the basis and strength of the prosecution's case. This opportunity is not available when a grand jury is considering returning an indictment. Consequently, it can be argued that a grand jury is resorted to only when it is required or when the prosecuting attorney wishes to avoid revealing his case.

It is the position of this Note that the availability of an alternative to the grand jury in no way detracts from the argument that a grand jury, when used, should be fairly and impartially drawn. Indeed, the argument is reinforced by the fact that the grand jury will probably be used only when the crime involves the severest punishment Min-

counties where the population is less than 100,000,[35] and section 593.14 specifies different procedures for larger counties.[36] This

nesota permits and/or when the prosecutor wishes to avoid disclosing the basis of his case. In such cases an impartially drawn grand jury would appear to be one of the most fundamental safeguards initially available to the accused.

35. MINN. STAT. § 593.13 (1967), provides in part:

Subd. 1. In all counties having a population of less than 100,000 the selection of qualified persons whose names are placed on the jury lists of each county shall be by a jury commission, said commission to be comprised of the clerk of district court of each county, the chairman of the county board of the county, and a resident of the county as appointed by the chief judge of the judicial district, said resident being designated the court appointed commissioner. The court appointed commissioner shall serve at the will of the chief judge of the district, and shall be designated the chairman of the jury commission.

Subd. 2. The jury commission, at a meeting to be called by the court appointed commissioner in January of each year, shall select 72 persons to serve as grand jurors and one name for each 100 persons residing in said county at the last federal census to serve as petit jurors. Provided however, that no less than 150 persons shall be selected to serve as petit jurors. Selection of grand and petit jurors shall be from the qualified voters of the county and taken from either the election register of those who voted in the last election in said county, or from the voter registration file where permanent registration systems are maintained. At the request of the jury commission the county auditor and the city, village and town clerks shall make available to the commission for its use their voting registers and registration lists.

Subd. 3. In selecting said names, the commissioners, beginning with the court appointed commissioner, shall each alternately place one name in a box to be known as the jury box, until the required number of names are contained therein. Separate lists of such names as are contained in said box and of the names selected to serve as grand jurors shall be certified and signed by the chairman of the jury commission and forthwith delivered to the clerk of court.

Subd. 4. In counties where the population exceeds 10,000, no person on such list drawn for service shall be placed on the next succeeding annual list, and the clerk of court shall certify to the jury commission, at its annual January session, the names on the last annual list not drawn for service during the preceding year, nor shall any juror at any one term serve more than 30 days and until the completion of the case upon which he may be sitting. The court may, with the consent of any such juror and with the consent of any parties having matters for trial, after such 30-day period has expired, hold and use such jurors so consenting to try and determine any jury cases remaining to be tried at such term between parties so consenting. . . .

36. MINN. STAT. § 593.14 (1967), provides in part:

Subd. 1. *In all counties having a population of more than 100,000, judges of the district court,* or a majority thereof, of the district embracing such county or counties *shall, annually,* in the month of December of each year, at the courthouse in such county, *select from the qualified electors of the county 125 persons* properly qualified to serve *as grand jurors,* and *2,000 persons* properly qualified to serve *as petit jurors,* and shall make out and certify separate lists thereof, and forthwith de-

legislative determination that the population of the county should determine the appropriate selection procedure was sustained at an early date by the Minnesota Supreme Court.[37]

B. Jury Selection Procedures in Sparsely Populated Counties Under Section 593.13

Section 593.13 places responsibility for the selection of prospective grand and petit jurors for sparsely populated counties in the hands of a jury commission.[38] The commission is composed of the clerk of district court for the county, a commissioner appointed by the district court, and the chairman of the county board of commissioners.[39] The section requires the commissioners to select the names of 72 qualified voters as prospective grand jurors,[40] and the name of one qualified voter for every 100 persons in the county as prospective petit jurors.[41] The section

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liver such lists to the clerk of the district court of the county; and from these lists of persons to serve as grand jurors and as petit jurors shall, respectively, be drawn all grand jurors and petit jurors at any time required for the transaction of business in the district court of such county . . . (emphasis added).

37. In State v. Ames, 91 Minn. 365, 98 N.W. 190 (1904), these selection procedures were attacked as unconstitutional class legislation. The court stated:

> . . . [T]he classification is not arbitrary, and is not based upon existing circumstances only, but has reference to a condition which, in the opinion of the legislators, exists in largely populated counties. The object to be attained was a method of selecting the best possible class of citizens to act in the capacity of jurors, and there is a reasonable foundation for the distinction made by the legislature in giving the selection of names from which the jurors should be taken to the judges of the court in counties of large population . . . . It may be reasonably asserted that the larger the county, the greater the opportunity for unwholesome influence in the selection of the jury list.

Id. at 371-72, 98 N.W. at 194. *See also In re* Jury Panel Selected for Dakota County, 276 Minn. 503, 150 N.W.2d 863 (1967), where the court stated in dictum:

> The legislature obviously intended that the largest counties should have a different method of jury selection, both as to the method of selection and the numbers of jurors selected. It was deemed advisable to identify such counties by population rather than name, a common method of classification.

Id. at 507, 150 N.W.2d at 866.

38. Minn. Stat. § 593.13(1) (1967). See note 35 *supra*, for the text of the subdivision.

39. *Id.* The county board of commissioners is the elected governing body of the county. *See* Minn. Stat. § 375.01 (1967).

40. Minn. Stat. § 593.13(2) (1967). See note 35 *supra*, for the text of the subdivision. *See also* note 34 *supra*.

41. *Id.* Under this procedure a minimum of 150 names must be placed on the lists of prospective petit jurors.

further provides that the names of the prospective grand and petit jurors must be obtained either from the register of persons who voted in the last election or from lists of persons properly registered to vote.[42] The section does not, however, specify the precise manner in which the names are to be extracted from the source lists.[43] It merely prohibits the jury commissioners from placing the names of persons who actually rendered jury service the preceding year on current source lists.[44]

Although the Minnesota Supreme Court has not yet ruled on the constitutionality of these provisions under the due process or equal protection clauses, a recent decision based upon the section as it stood prior to revision by the 1967 legislature sheds some light on how the court would handle these questions. In *State ex rel. Bush v. Tahash*[45] an Indian defendant asserted a violation of due process on the ground that the jury which convicted him was the product of a selection system which discriminated against members of the Indian race.[46] The county's petit jury venires revealed that for a three year period five and one-third per cent of the persons on the venires were of Indian extraction.[47] Although defendant asserted that Indians represented approximately 12 per cent of the general population of the county, he failed to assert or establish what percentage were qualified voters and thus eligible for jury service.[48] The court concluded:

> The selection of jurors from a list of qualified voters is constitutionally permissible, and the fact that a definable class of persons represents a higher proportion of the population as a whole than it does of those qualified to vote does not invalidate a system of selection.[49]

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42. MINN. STAT. § 593.13(2) (1967). See note 35 *supra*, for the text of the subdivision.

43. MINN. STAT. § 593.13(3) (1967). See note 35 *supra*, for the text of the subdivision. *See also* note 61 *infra*, and accompanying text for a discussion of the impact of this subdivision's vagueness.

44. MINN. STAT. § 593.13(4) (1967). See note 35 *supra*, for the text of the subdivision. This prohibition does not apply to counties where the population is less than 10,000. *Id.*

45. ___ Minn. ___, 161 N.W.2d 326 (1968).

46. *Id.* at ___, 161 N.W.2d at 329.

47. *Id.* at ___, 161 N.W.2d at 328. A stipulation on evidence provided: The list for 1961 contained eight people of Indian extraction, or 5⅓% of 150 names; the list for 1962 contained seven people of Indian extraction, or 4⅔% of 150 names; the list for 1963 contained 9 people of Indian extraction, or 6% of 150 names. *See also* Brief for Respondent at 3, Brief for Appellant at 4.

48. *See* note 47 *supra.*

49. ___ Minn. ___, ___, 161 N.W.2d 327, 328 (1968). The court buttressed this conclusion by noting that the only qualifications for voting in

The court, relying upon *Swain v. Alabama*[50] and apparently assuming that all Indians in the county were qualified voters, further concluded that the disparity between the percentage of Indians in the general population and the percentage on jury lists was not of sufficient magnitude to constitute a prima facie case of invidious discrimination.[51]

While the soundness of the court's decision in this case cannot be doubted under standard constitutional doctrines, the breadth of the provisions of section 593.13 under which the case arose should be noted.[52] For example, under the section as it then stood the officials responsible for jury selection could obtain the names of prospective jurors from any source and could choose by means of any mechanical selection procedure they deemed appropriate.[53] The only limitation was that the persons included had to be qualified voters.[54] The section did not impose any restrictions upon exclusion from jury service.[55] Thus, the provisions under which the *Bush* case was decided vested almost absolute discretion in the officials responsible for jury selection and certainly afforded opportunities for both blatant and subtle discrimination and prejudice in the selection process. Even though the present provisions of section 593.13 are more precise than those under which *Bush* arose,[56] there is no reason

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Minnesota are age, United States citizenship and residency in a Minnesota election precinct. The right to vote is not dependent upon economic status or payment of taxes. *Id. See also* MINN. STAT. § 200.02 (1965).

50. 380 U.S. 202 (1965).

51. For cases demonstrating the disparity required to make out a prima facie case of discrimination, see note 21 *supra*, and accompanying text.

52. MINN. STAT. § 593.13 (1947), provided in part:

> The county board, at its annual session in January, shall select, from the *qualified voters* of the county, 72 persons to serve as grand jurors, and 144 persons to serve as petit jurors, and make separate lists thereof, which shall be certified and signed by the chairman, attested by the auditor, and forthwith delivered to the clerk of the district court. If in any county the board is unable to select the required number, the highest practicable number shall be sufficient. No person on such list drawn for service shall be placed on the next succeeding annual list, and the clerk shall certify to the board, at its annual January session, the names on the last annual list not drawn for service during the preceding year, nor shall any juror at any one term serve more than 30 days and until the completion of the case upon which he may be sitting.

53. *Id.*

54. *Id.* Presumptively, it was only necessary to be a qualified voter at the time of selection.

55. *Id.*

56. *Compare* MINN. STAT. § 593.13 (1967), note 35 *supra*, *with* MINN. STAT. § 593.13 (1947), note 52 *supra*.

to suspect that the court would resolve the constitutional questions of the case any differently under the current provisions.

At least two of the present provisions of section 593.13 afford opportunities for discrimination and prejudice in the selection of prospective grand and petit jurors. First, the section specifically requires that prospective jurors' names be obtained from source lists that are intimately related to the franchise.[57] While the use of such lists is a natural corollary to the requirement that jurors must be "qualified voters,"[58] the permissible uses of the lists under present provisions of section 593.13 present some difficulties. The fact that the statute does not go beyond mere specification of source lists allows officials to afford disproportionate representation to particular segments of the county because of geographical concentration and governmental subdivision. For example, counties are subdivided into lesser governmental units including townships, cities, villages and towns, and the source lists specified in section 593.13 are maintained at the lower levels.[59] Under the section, jury commissioners are not required to have the source lists from all lesser governmental subdivisions at their disposal when they select the names of the prospective jurors. Moreover, even if the commissioners have all the lists in their possession, they are not required to use all of them. Thus it appears that jury commissioners are free to select prospective jurors from exclusively urban or exclusively rural segments of the county.[60]

Another, and related problem with section 593.13 is its ambiguity with respect to the manner in which names and prospective jurors are to be extracted from the specified source lists. The section provides:

> In selecting said names, the commissioners, beginning with the court appointed commissioner, *shall each* alternately place one

57. MINN. STAT. § 593.13(2) (1967). See note 35 *supra* for the text of the subdivision.

58. *Id.*

59. MINN. STAT. § 201.02 (1967).

60. Other than the provisions specifying the source lists, the only pertinent provision provides:

> At the request of the jury commission the county auditor and the city, village and town clerks shall make available to the commission for its use their voting registers and registration lists.

MINN. STAT. § 593.13 (2) (1967). See note 35 *supra* for the text of the entire subdivision. This provision appears to be directory only and vests complete responsibility in the commissioners for obtaining and using *all* of the source lists.

> name in a box to be known as the jury box, until the required number of names are contained therein. . . .[61]

This provision is amenable to two possible interpretations. First, it may be read as simply specifying the order in which the commissioners must select the names of prospective jurors. If this is the correct construction, the provision would appear to be of limited utility. Although it would ensure that each commissioner selects the same number of prospective jurors, it would still apparently leave each commissioner free to pick and choose from the names on the source lists at his discretion. The provision could also be construed to require the commissioners to extract names in accordance with the order in which they appear on the lists; for example, it might mean that every other, or every third name must be selected for prospective jury service. This construction would eliminate the commissioners' discretion to pick and choose freely from the list and to exclude qualified voters arbitrarily on the basis of personal prejudice or bias. If this second construction was the one intended by the legislature, it is submitted that the provision is so ambiguously drawn that that intent will not be implemented. In the absence of a definitive judicial interpretation, the provision merely compounds present uncertainty in the area of jury selection for sparsely populated counties. The potential for abuse of source lists and the ambiguity in the mechanics provision of section 593.13 could and should be eliminated. Mandatory selection from consolidated source lists would eliminate the former and a simple clarification could convert the mechanics provision into a useful safeguard.

C. Jury Selection Procedures in Densely Populated Counties Under Section 593.14—Hennepin County

The provisions of section 593.14 govern the initial jury selection processes in counties whose populations exceed 100,000. The statute vests complete responsibility for obtaining prospective grand and petit jurors in the district court judges.[62] In Henne-

61. Minn. Stat. § 593.13(3) (1967) (emphasis added). This provision was inserted into the section by the 1967 legislature. Prior to that time there was no mention of selection mechanics. *Compare* text of Minn. Stat. § 593.13 (1967), note 35 *supra*, *with* text of Minn. Stat. § 593.13 (1947), note 52 *supra*.

62. Minn. Stat. § 593.14(1) (1967). See note 36 *supra* for the text of the subdivision. It should be noted that the provisions of this section relating to the initial selection process were not modified by the 1967 legislature. *Compare* Minn. Stat. § 593.14(1) (1967), note 36 *supra*, *with* Minn. Stat. § 593.14(1) (1947).

pin County,[63] the judges have developed different systems for selecting prospective petit as opposed to grand jurors.

Under section 593.14 the district court judges are required to select the names of 2,000 "qualified electors" as prospective petit jurors.[64] In practice, approximately 11,600 names are selected.[65] In Hennepin County these names are currently obtained from three source lists: rural polling lists, polling lists from towns and villages in the county, and the Minneapolis City Directory.[66] The selection procedure can be described as follows: At a November meeting of Hennepin County's 16 district court judges, each judge is assigned a portion of the source lists. Each then selects approximately 400 names from the directory and 325 names from the other lists. Individuals who are statutorily exempted or disqualified from jury service are excluded. From the resulting master lists, petit jurors are drawn for service.[67]

Section 593.14 further requires the judges to select 125 "qualified electors" as prospective grand jurors for Hennepin County.[68] The system developed by the judges to select these jurors has been characterized as a "personal selection system."[69] At a November meeting each district court judge submits the names of from nine to 11 friends and acquaintances for consideration as grand jurors for the following year. In making these suggestions each judge purportedly considers the intelligence, common sense, stability, and fitness for jury service possessed by each suggested juror. Walk of life and geographical situs in the community are allegedly not considered. The judges then discuss the suggested names with the object of discovering duplicate suggestions and eliminating either exempted individuals or those who are personally objectionable to any of the judges.[70] From the agreed-upon list of prospective grand jurors

63. Because of the limited availability of source materials, the major emphasis of this Note with regard to section 593.14 will be directed at Hennepin County, to the exclusion of other large counties to which the section also applies.

64. MINN. STAT. § 593.14(1) (1967). See note 36 *supra*, for the text of the subdivision.

65. State v. Dilliard, 279 Minn. 414, 416, 157 N.W.2d 75, 77 (1968).

66. *Id.* at 416, 157 N.W.2d at 77.

67. *Id.*

68. MINN. STAT. § 593.14(1) (1967). See note 36 *supra*, for the text of the subdivision. *See also* note 34 *supra*.

69. Brief for Appellant at 6, State v. Dilliard, 279 Minn. 414, 157 N.W.2d 75 (1968) [hereinafter cited as Brief for Appellant].

70. State v. Dilliard, 279 Minn. 414, 416-17, 157 N.W.2d 75, 76 (1968). *See also* Brief for Appellant at 2.

46 are ultimately drawn for service.[71]

This personal selection system was recently sustained by the Minnesota Supreme Court on constitutional grounds. In *State v. Dilliard* a Negro physician challenged his indictment by a Hennepin County grand jury.[72] The defendant attacked the personal selection system on two grounds. He urged first that the system embodies an inherent tendency toward discrimination in that a prospective juror's race and socio-economic status are necessarily

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This personal selection system is merely a variation of the "key man" system which has historically been widely used to obtain prospective jurors for the federal court system. Lindquist, *An Analysis of Juror Selection Procedure in the United States District Courts*, 41 TEMP. L.Q. 32, 33 n.8 (1967), indicates that as many as 46% of the federal judicial districts have relied exclusively on key man systems and approximately 22% have used the system in conjunction with other sources to obtain prospective jurors. Under the key man system, prominent members of the community provide officials with lists of individuals for prospective jury service. Thus, the key men act as screening agents and suggest the names of only those individuals whom they believe are competent to render serice. Under the system used to obtain grand jurors in Hennepin County the district court judges act as both key men and selection officials.

The key man system is most often criticized for its purported failure to secure lists of jurors which fairly represent a cross-section of the community. *See, e.g.*, Cassell v. Texas, 339 U.S. 282, 289 (1950); Hill v. Texas, 316 U.S. 400, 404 (1942); Smith v. Texas, 311 U.S. 128, 132 (1940). *See also* Brief for Appellant at 7. The thrust of this criticism has been twofold. First, the key men themselves represent only a very narrow segment of the community; and second, they may have failed to acquaint themselves with other segments of the community. Despite the obvious inadequacies of the key man system, as demonstrated by the numerous cases which have found unconstitutional discrimination, *see* cases cited immediately above, a survey of federal district court judges reported in Lindquist, *supra*, at 44-45, indicated that most judges felt that the system did produce a cross-section of the community. For contrasting views of reform of the key man and federal jury system compare Hart, *The Case for Federal Jury Reform*, 53 A.B.A.J. 129 (1967), with Erwin, *Jury Reform Needs More Thought*, 53 A.B.A.J. 132 (1967). *See generally The Jury System in the Federal Courts*, 26 F.R.D. 409 (1960).

71. The final drawing process is relatively simple and fair. The clerk of court transcribes the names from the master list to separate pieces of paper, folds each piece, and places it in a box. When it becomes necessary to draw a panel, the clerk, in the presence of another official, draws 23 names from the box. This process is repeated for each grand jury that is impaneled. *See* MINN. STAT. §§ 628.41, .45 (1967). *See also* State v. Dilliard, 279 Minn. 414, 415-16, 157 N.W.2d 75, 77 (1968).

72. A motion to quash the indictment charging illegal prescription of narcotics was denied by the district court and the constitutional questions raised by the motion were certified to the Minnesota Supreme Court under MINN. STAT. § 632.10 (1967). 279 Minn. at 415, 157 N.W.2d at 75.

considered in the selection process.[73] Second, the defendant urged that the system is unconstitutional because the selectors, the district court judges, represent a very limited segment of the community and as such are incapable of compiling a master list comprising a fair cross-section of the community.[74] In support of his contentions, defendant demonstrated that few Negroes had been placed on the master lists or selected to serve as grand jurors over an extended period of time.[75] He further showed a distinct tendency toward exclusion of the lower socio-economic segments of the county from prospective grand juror lists.[76]

The Minnesota Supreme Court responded to defendant's contentions by holding that the personal selection system was not constitutionally unsound and that the defendant had not established any misuse of the system that was prejudicial to him.[77] The court summarily dispensed with the claim that Negroes had been systematically excluded from grand jury service by noting that the number of Negroes on the venire from which the indicting grand jury was drawn was roughly comparable to the Negro percentage of the population.[78] Reliance was also placed on the fact that in most exclusion cases the number of Negroes selected was far below their proportion in the general popu-

73. *See* Brief for Appellant at 10-11. In making this argument strong reliance was placed on the principle of color blindness established by Brown v. Board of Educ., 347 U.S. 483 (1954). Cases like Cassell v. Texas, 339 U.S. 282, 289 (1950), and Hill v. Texas, 316 U.S. 400, 404 (1942), which had placed an affirmative duty on commissioners to acquaint themselves with all segments of the community, and the decision in Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), which approved conscious awareness of race, were discarded as inconsistent with the principles of *Brown*. Brief for Appellant at 10-11.

74. Brief for Appellant at 12-13. In making this argument appellant relied on language in Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966), which he felt indicated that *Rabinowitz* had held key man selection invalid. The court, relying on Mobley v. United States, 379 F.2d 768 (5th Cir. 1967), rejected this contention. State v. Dilliard, 279 Minn. 414, 421, 157 N.W.2d 75, 80 (1968). *See also* Comment, 4 HOUSTON L. REV. 570 (1966).

75. From 1951 through 1966 only two Negroes served as grand jurors; from 1951 through 1965 only two Negroes were on the lists of prospective grand jurors; four were included in 1966. Brief for Appellant at 4.

76. For the statistical data supporting this contention see note 92 *infra*, and accompanying text.

77. State v. Dilliard, 279 Minn. 414, 420-21, 157 N.W.2d 75, 81 (1968).

78. *Id.* at 417, 157 N.W.2d at 77-78. The parties had stipulated that Negroes represented approximately 2% of the population of the county. *See also* 1960 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: MINNESOTA, Table 13, at 25-41 (1961). The court apparently disregarded the fact that during the 15 year period prior

lation.[79] The court felt that the percentage of Negroes in Hennepin County was so small that merely drawing the final grand jury panel by lot could account for the rare service by Negroes.[80]

The court also rejected defendant's contention that lower socio-economic classes had been unconstitutionally excluded from consideration as grand jurors. While recognizing that such exclusion—either intentional or because the judges were unacquainted with members of these classes—could not be constitutionally justified, the court characterized defendant's statistical occupational categorizations of persons on prior venires as "practically worthless."[81] This conclusion was premised on the notion that some members of the excluded classes may have been placed in imprecise occupational categories to which significant percentages had been attributed.[82] In short, the court felt that defendant had failed to establish a case of socio-economic discrimination. The court further emphasized in dicta that even if such discrimination had been established by the offered proof, the defendant lacked standing to challenge it because he was not a member of the excluded class.[83]

While the decision in *Dilliard* may accord with established constitutional doctrine,[84] and while section 593.14 and the procedures for selecting grand and probably petit jurors have received judicial approval, it seems clear that both the section and selection procedures are seriously defective. In short, the available opportunities for discrimination and prejudice in the selection process have not been reduced to an absolute minimum in Minnesota. An examination of the defects of section 593.14 and the practical consequences of the selection procedures developed by the district court judges thereunder will indicate that legislative revision of the section is necessary.

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to 1966, the percentage of Negroes on the master lists equaled only 5.3% of the total number that would have been included (37.5) had 2% of the population been represented. This is particularly striking in view of the total absence of any explanation of why the number suddenly increased in 1966 and the lack of any assurance that the increase would be retained in future years.

79. 279 Minn. at 418, 157 N.W.2d at 78.

80. *Id.* at 417, 157 N.W.2d at 78. See note 71 *supra*, for a description of the final drawing process.

81. 279 Minn. at 417, 157 N.W.2d at 77.

82. *Id.* at 417, 157 N.W.2d at 77; *see* note 92 *infra*, and accompanying text.

83. *Id.* at 421, 157 N.W.2d at 80. See note 12 *supra*, for cases reaching a similar result under the due process "same class" rule.

84. *See* notes 7-22 *supra*, and accompanying text.

1. *Selection of Petit Jurors Under Section 593.14*

Section 593.14 vests the district court judges with complete discretion in establishing selection procedures for prospective petit jurors.[85] Thus, the section leaves the judges free to select prospective petit jurors from any sources, in any manner, and upon consideration of any subjective criteria they choose.[86] While some would argue that the judiciary would never engage in discrimination, it is clear that the opportunity to do so exists under the section. It may also be argued that the sheer number of necessary selections and the limited information available to the judges would impede any arbitrary or systematic discrimination. This argument, however, is not convincing. A lack of information may itself result in non-representative jury lists,[87] and even limited information may provide a basis for excluding those particular segments of the community which a selection official may find objectionable.[88]

In view of the wide potential for abuse afforded by section 593.14, the selection system devised and used by the district court judges appears to be a reasonable attempt to achieve jury lists which represent a broad cross-section of the community. However, this is not to say that the selection procedures reduce the available opportunities for discrimination and prejudice to an absolute minimum. The practice of using source lists does not by itself ensure that various economic, social or ethnic groups will be represented on the final prospective juror lists. It is not only possible that the source lists themselves may disproportionately reflect elements of the county, but prospective jurors could be selected from only particular elements represented on the lists. This result could obtain because of the tendency toward geographical concentration according to race and socio-economic status and the fact that source lists are related to geographical location.[89] This danger may be overrated, however, since the

85. MINN. STAT. § 593.14(1) (1967). See note 36 *supra*, for the text of the subdivision.

86. *Id.*

87. *See* Cassell v. Texas, 339 U.S. 282 (1950), where the Supreme Court indicated that because a lack of information may result in non-representative jury lists, the officials responsible for selection are under an affirmative duty to acquaint themselves with the various segments of the community.

88. A mere name or address may indicate racial, socio-economic, or ethnic class. If the opportunity to discriminate is present, even this very limited information may provide a basis for arbitrary exclusion or inclusion on prospective jury lists.

89. *See* note 66 *supra*, and accompanying text.

current practices for selecting petit jurors in Hennepin County include random allocation of source lists to the various judges of the county.[90]

It is submitted that legislative action with regard to the selection of prospective petit jurors under section 593.14 would be desirable. Source lists and selection mechanics could easily be designed to eliminate the present opportunities for discrimination and prejudice under section 593.14.

2. *Selection of Grand Jurors Under Section 593.14*

The "personal selection system" used to obtain prospective grand jurors for Hennepin County under section 593.14, while not constitutionally unsound,[91] has produced some results which are questionable on policy grounds. For example, the system has resulted in the compilation of master lists and grand juries composed of members of the highest socio-economic classes of the county.[92] This composition has recently been described as follows:

> . . . [F]or the past sixteen years approximately 40% of the persons placed on the master lists were high corporate officers, and . . . only two persons could be considered "blue collar" or hourly wage earners. No unskilled or common laborers during

90. *See* note 67 *supra*, and accompanying text.

91. *See* notes 72-84 *supra*, and accompanying text.

92. *See* Brief for Appellant at 3-4. *See also* State v. Dilliard, 279 Minn. 414, 416-17, 157 N.W.2d 75, 77 (1968), where the following statistics for the 1966-67 grand jury venires for Hennepin County were cited:

	Occupations	*Percentage on Venire*
1.	Corporate executive officers	37.0%
2.	Self-employed	5.0%
3.	Retired person—former occupations unknown	11.0%
4.	Union executives	13.0%
5.	Educators	3.0%
6.	Housewives	12.0%
7.	Unskilled laborers	0.0%
8.	Hourly wage earners	0.8%
9.	Miscellaneous occupations	8.0%
10.	Occupations unknown	10.0%
		99.8%

While some of the above categories are imprecise, it should be noted that if the vague ones, numbers 3, 9, and 10, are totaled, and that total, 29%, is categorized entirely as unskilled and hourly wage earners, the percentage representation of those groups on the 1966-67 venire would still be considerably less than the percentage of corporate executives on the venire, and it would still be drastically less, 21% plus, than their purported percentage representation in the adult population of the county. *See* Brief for Appellant at 17, where that percentage was described as "well over 50%."

> this period of time have been placed on the grand jury venires.[93]

If this description of grand jury venire compositon is even reasonably accurate, a substantial question is raised as to whether the resulting grand juries were able to inquire fairly into the matters brought before them. At least one recent study demonstrated that compositions of this sort produce prosecution-oriented juries.[94] Further, it would appear that such an orientation would obtain regardless of whether the composition of the venires was intentionally manipulated or was merely the inevitable result of a section which vests unlimited discretion in the selection officials.

In *Ballard v. United States*,[95] the United States Supreme Court recognized that an alert blue collar worker or laborer may be a more valuable and capable juror than a sluggish business executive or educator. The Court stated: "Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter."[96] The Minnesota state legislature should also recognize that juror competence is an individual matter and enact a selection system that would eliminate the socio-economic imbalance that now exists in the grand jury venires of Hennepin County.[97] Such legislation

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93. Brief for Appellant at 4.

94. *See* Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 748 (1959), where it was pointed out that blue ribbon jurors, which represent higher socio-economic groups, were more likely to convict than other jurors. Admittedly there is a distinction between the New York blue ribbon jury that was the subject of the study and juries which result from the selection system in Hennepin County. Nevertheless, the analogous socio-economic composition of lists of prospective jurors makes the findings of the Chicago study relevant to the selection of grand jurors in Hennepin County.

95. 329 U.S. 187, 193 (1946).

96. *Id. See also* S. MCCART, TRIAL BY JURY 25 (1964):

> Intelligence and common sense are the important attributes of a juror, and these qualities are not limited to persons of any particular background, training, or education.

97. While precise socio-economic representation on lists of prospective jurors is not required, *see* cases cited note 32 *supra*, and accompanying text, the Supreme Court has exercised its supervisory powers over the federal courts to prevent discrimination against lower socio-economic classes. In Thiel v. Southern Pac. R.R., 328 U.S. 217 (1946), a selection system was challenged on the ground that business executives and persons having the employer's point of view had been purposely selected. The Court stated:

> Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low

should also ensure full representation of Negroes on grand jury venires.

A second practical result of the "personal selection system" which raises policy questions is that many individuals are repeatedly recommended for service. For example, in a recent six year period, 1961 through 1966, 101 names appeared on the lists of prospective grand jurors twice, 49 appeared three times, 16 appeared four times, and two were on five of the six lists. Thus, out of a total of 750 prospective grand jurors for the period, 255 names appeared more than once.[98]

There are countervailing considerations that must be evaluated and weighed before repetitious listing of prospective grand jurors can be condemned. For example, repetitious listing may manifest in part the laudable desire to obtain well qualified grand jurors. Certainly such jurors should have an understanding of the scope and nature of their duties. They should be groomed to serve intelligently, expertly and cheerfully.[99] Repetitious listing may in part accomplish these objectives by increasing the chances that certain individuals of proven ability who are familiar with the operation of the grand jury will ultimately be selected to serve on several panels.

The traditional concept of the grand jury as an independent investigatory and decision-making body must be balanced against the arguments and objectives described above.[100] Surely the repetitious listing of high socio-economic and possibly prosecution-oriented prospective grand jurors can only impede that function.[101] In addition, it has been recognized that jury service, both grand and petit, is the chief remaining governmental function either directly performed[102] or indirectly observed by lay citizens.[103] Maximizing the number of persons who have an opportunity to serve or observe would increase this citizen-law contact. As a result the public would gain a better understand-

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economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do. *Id.* at 223-24.

98. *See* Brief for Appellant at 4.

99. *See* B. BOTEIN, TRIAL JUDGE 210 (1952).

100. *See generally* Note, *Grand Jury, Investigatory Powers and Limitations*, 37 MINN. L. REV. 586 (1953).

101. *See* note 94 *supra*, and accompanying text.

102. *See* C. JOINER, CIVIL JUSTICE AND THE JURY 77 (1962).

103. See Broeder, *supra* note 94, at 751, where it is pointed out that up to 50% of the general public is acquainted with persons who have rendered jury service.

ing of the operation of the legal system, and that system, in turn, would be kept more in tune with the constantly changing attitudes and mores of the community.[104] On balance, it is submitted that the considerations against repetitious listing outweigh those in favor of it, and that legislative action to curb the practice would be in order.

Throughout the discussion of sections 593.13 and 593.14, legislative action that would eliminate the ambiguities and discretionary aspects of those statutes has been urged.[105] Recently, the federal government enacted a jury selection statute which avoids many of the defects of the Minnesota system.[106] Thus, an examination and discussion of that statute will reveal precise guidelines along which future revision of sections 593.13 and 593.14 could be patterned.

IV. THE JURY SELECTION AND SERVICE ACT OF 1968

The Jury Selection and Service Act of 1968 represents a significant departure from previous jury selection procedures in the federal system.[107] The declared policy of the Act is to provide procedures whereby potential jurors will be selected at random from a fair cross-section of the community and to ensure that all qualified citizens have an opportunity to be considered for grand and petit jury service.[108] In order to accomplish these objectives the Act specifically prohibits the exclusion of other-

104. *See* C. JOINER, *supra* note 102, at 78.

105. For opposite views of the degree of discretion that can safely be vested in jury selection officials compare Hart, *The Case for Federal Jury Reform*, 53 A.B.A.J. 129, 130 (1967), with Ervin, *Jury Reform Needs More Thought*, 53 A.B.A.J. 132, 135 (1967).

106. Jury Selection and Service Act, 28 U.S.C., ch. 121, §§ 1861-74 (1968), *formerly* 62 STAT. 951 (1948), *as amended* 71 STAT. 638 (1957) [hereinafter cited only as *Act* and section number].

107. 28 U.S.C., ch. 121, §§ 1861-71 (1964), had previously controlled the selection of jurors for the federal courts. Changes in these sections were recommended in 1960 by the Committee on the Operation of the Jury System of the Judicial Conference of the United States. *See The Jury System in the Federal Courts*, 26 F.R.D. 409 (1960). These recommendations were embodied in Title I of the Civil Rights Act of 1966. *See* H.R. REP. No. 1076, 90th Cong., 2d Sess. 33 (1968) [hereinafter cited as H.R. REP. No. 1076]. Although Title I passed the House in August, 1966, its ultimate adoption was blocked by a Senate filibuster. *See* Hart, *supra* note 105, at 130. The provisions of Title I applicable to jury selection were identical in terms of objectives and fundamental principles to those finally embodied in the Jury Selection and Service Act of 1968. *See* H.R. REP. No. 1076 at 3.

108. *See Act*, § 1861. *See also* S. REP. No. 891, 90th Cong., 1st Sess. 25 (1967) [hereinafter cited as S. REP. No. 891].

wise qualified citizens on the grounds of race, color, religion, sex, national origin, or economic status.[109] In addition, the Act prohibits the use of key man selection systems for federal court jurors.[110]

Under the Act, a formal written plan of jury selection must be developed by each judicial district.[111] Each plan must be approved by a panel composed of members of the judicial council for the circuit in which the district is located.[112] While each district remains free to modify its plan to meet changed conditions, any modifications must be communicated to the supervisory panel, the Administration Office of the United States Courts, and the Attorney General of the United States.[113] In addition, the central feature of each plan must be the random selection of prospective jurors, which precludes possibilities of discrimination.[114] As a further means of avoiding discrimination, each plan must specify the source lists from which names of prospective jurors may be drawn. Voter registration lists are to be used as the base lists, but other sources also may be used to ensure that members of the disenfranchised population have the opportunity to serve as grand or petit jurors.[115] Each plan must set out the mechanical procedures of selecting prospective jurors

109. *See Act*, § 1862. Former section 1863 had provided that: "No citizen shall be excluded from service as grand or petit juror in any court of the United States on account of race or color." For cases which have precluded discrimination on grounds similar to those contained in present section 1862 see note 24 *supra*.

110. *See* H.R. REP. No. 1076 at 4. *See also* S. REP. No. 891 at 10-11, 16.

111. *See Act*, § 1863. *See also* H.R. REP. No. 1076 at 8; S. REP. No. 891 at 26-27.

112. *See Act*, § 1863(a). *See also* H.R. REP. No. 1076 at 8, where it is pointed out that the reviewing panel's function is to determine whether the formal plan is in compliance with the statutory requirements and not to concern itself particularly with the effectiveness of the plan. *See also* S. REP. No. 891 at 26.

113. *See Act*, § 1863(a).

114. *Id.* H.R. REP. No. 1076 at 4, indicates that random selection was extended to the initial selection processes in the belief that it would virtually eliminate the possibility of impermissible discrimination and arbitrariness at all stages of the jury selection process, and thereby tend to insure that lists of prospective jurors are drawn from a cross-section of the community. *See also* S. REP. No. 891 at 16.

115. *See Act*, § 1863(b)(2). *See also* H.R. REP. No. 1076 at 4, and S. REP. No. 891 at 16-18, where the use of source lists was described as follows:

> The bill specifies that voter lists be used as the basic source of juror names. These lists provide the widest community cross-section of any list readily available. . . . [V]oter lists [must]be supplemented by other sources whenever they do not adequately reflect a cross section of the community.

from the specified source lists.[116] Basic responsibility for managing the selection procedure thus established may be vested either in a jury commission or in the clerk of the district court.[117]

In addition to the general provisions described above, the Jury Selection and Service Act of 1968 contains other provisions which are particularly relevant to the initial selection processes. For example, sections 1864 and 1865 preclude consideration of an individual's qualifications until after his name has been drawn for service and he has furnished specified information relating to his qualifications.[118] Inquiries as to race and occupation may be made, but the individual need not respond and his failure to do so will not affect his ability to serve.[119]

The Act also provides that an individual can challenge a particular panel any time before *voir dire* examination begins or within seven days after the time he could reasonably have discovered a substantial failure to comply with the terms of the Act.[120] At such time, he is given the right to inspect and reproduce any records and papers of the selection officials that may be necessary for the preparation of his challenge.[121] Upon proper challenge, a substantial failure to comply with the Act will result in a stay of proceedings until a new petit jury panel is selected. In the case of a grand jury, dismissal of the indict-

116. *See Act*, § 1863(b)(3).

117. *See Act*, § 1863(b)(1).

118. *See Act*, §§ 1864(a), 1865(a)-(b). Section 1865(b) provides for disqualification only if the individual whose name is drawn is not a citizen of the United States; less than 21 years of age; has not resided in the judicial district for one year; is unable to read, write, and understand the English language with the degree of proficiency necessary to fill out the qualification form; is unable to speak English; is incapable, because of physical or mental infirmity, of rendering satisfactory jury service; or has a charge pending against him for the commission of, or has been convicted of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

H.R. REP. No. 1076 at 5 indicates that these are the maximum qualifications that may be considered. *See also* Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966). The legislative intent behind prohibiting consideration of qualifications until after initial selection has been completed was to prevent consideration of subjective criteria beyond the objective standards outlined in the section. H.R. REP. No. 1070 at 5-6; S. REP. No. 891 at 17-18.

119. *See Act*, § 1869(h). Such questions are allowed on the grounds that they may be useful under the local plan of selection provided they are not inconsistent with the purposes of the act. *See* H.R. REP. No. 1076 at 17.

120. *See Act*, § 1867(a).

121. *Id.* § 1867(f). This right is of particular value to indigents and in cases where an extensive examination of venires is required.

ment may result.[122]

The vital significance of the challenge provision and those which preclude discrimination in the selection process is that they reduce what may previously have constituted violations of due process or equal protection to the status of violations of specific statutory provisions.[123] The precise selection guidelines and the availability of documents should greatly relax the evidentiary burdens that must currently be met to establish violations of due process and equal protection.

This terse discussion of the Jury Selection and Service Act of 1968 demonstrates that the approach to jury selection reflected in the Act is antithetical to the approach presently embodied in sections 593.13 and 593.14 of the Minnesota statutes. For example, under section 593.13 there is no statutory guarantee that all the designated source lists from the various governmental subdivisions will be available or used in the selection of prospective grand and petit jurors.[124] Furthermore, the ambiguous nature of the selection mechanics set out in the section permits consideration of irrelevant subjective matters and arbitary exclusion from prospective jury service.[125] Also, under section 593.14, the procedures employed for selecting prospective grand and petit jurors for large Minnesota counties are entirely discretionary. The resulting opportunities for discrimination and prejudice in the use of source lists for obtaining petit jurors,[126] and the practical consequences of repetitious listing and socio-economic imbalance on lists of prospective grand jurors have been demonstrated.[127]

V. CONCLUSION

The present Minnesota jury selection system and the procedures that have been established under it could properly be subjected to further legislative revisions. The provisions of sec-

122. *Id.* § 1867(a).

123. H.R. REP. No. 1076 at 16, indicates that these provisions eliminate the need to prove prejudice as a condition of judicial intervention when substantial noncompliance with the Act is established. The prejudice requirement was eliminated because the committee felt that it would unduly burden the procedure for challenging noncompliance. See notes 11-13 *supra*, with regard to the requirement of showing prejudice to establish a violation of due process.

124. *See* notes 57-60 *supra*, and accompanying text.

125. *See* note 61 *supra*, and accompanying text.

126. *See* notes 86-90 *supra*, and accompanying text.

127. *See* notes 92-104 *supra*, and accompanying text.

tion 593.13 which relate to the use of source lists and the selection of prospective jurors from those lists should be clarified to eliminate the opportunities for discrimination and prejudice that presently exist. Section 593.14 should be extensively revised and the discretionary aspects of that section should be eliminated. Precise statutory provisions with respect to use of source lists and random selection would eliminate the opportunities for discrimination and prejudice and the socio-economic imbalance that currently prevail. The Jury Selection and Service Act can provide a useful and meaningful guide for these recommended revisions of the Minnesota jury selection statutes.